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been said that equity has its law as law has its equity. This is another way of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application to the discretion of the chancellor in doubtful cases only. Even in those cases the chancellor is charged with the duty of balancing rights rather than permitted to grant favors "of grace".²⁷

Thus, the lawyer when confronted with a case of this kind must examine the facts surrounding the defendant's case with the same care as he examines those of his own client. Otherwise, how can he tell whether the delay of the plaintiff, if any there be, has existed sufficiently long to have allowed the defendant to have been placed at a disadvantage by reason of a change of position or condition?

Frank H. Strouss.

Former Judge of Northumberland County.

LIABILITY OF THEATER OWNERS FOR INJURIES TO PATRONS ON THE PREMISES

(PENNSYLVANIA CASES)

It is interesting to note that the Pennsylvania judiciary did not enunciate the rule concerning liability of theater owners for injuries sustained by patrons until 1926. Three years prior to that time, the Superior Court, in the case of *Leckstein vs. Morris*, 80 Pa. Super. 352, was confronted with a case involving the liability of theater owners, but the Court did not avail itself of the opportunity to expound the applicable principles.

From the plaintiff's testimony in that case, it appeared that she and her grandchild attended the defendant's theater. Since the child had occasion to use the toilet, the plaintiff made an inquiry of an attendant, who directed her to the public lavatory in the basement. The steps were

²⁷*Sullivan v. Steel Co.* 208 Pa. 540 at 554.

very dimly lighted. One of the steps was defective, and when the plaintiff, who was descending carefully, tramped on it, she was thrown to the bottom of the steps and was injured. The break on the step appeared to be an old one and had been seen by a witness six days before the accident, "so that sufficient time had elapsed for the defendant to have constructive notice of its defective condition."

This evidence was contradicted flatly by the defendant, and the trial court submitted the case to the jury, which returned a verdict for the plaintiff, judgment being entered on the verdict. The defendant appealed to the Superior Court, which merely held that the case was one properly for the jury, and did not discuss the pertinent legal phases of the case.

Three years later, both the Superior and Supreme Courts were confronted with controversies in which the liability of a theater owner was at issue. In both of these cases, the Courts announced and applied the general rules relating to such accidents.

In *Rutherford vs. Academy of Music*, 87 Pa. Super. 355, the facts were as follows:

The plaintiff purchased a ticket for a moving picture entertainment, entered the theater, and walked upstairs to the third floor, with which part of the building she was not familiar. When she reached the third floor, she handed her ticket to one of the ushers. The latter took the ticket and told the plaintiff to "go around the corridor to No. H." The corridor was dark, but it was "light enough to advance in." As the plaintiff was passing carefully through the curved corridor as directed, she noticed Section G, but before she reached Section H she fell down a short flight of stairs which she said she could not see, and sprained her ankle.

The case was submitted to the jury and a verdict was returned in favor of the plaintiff. The Court, however, on motion of the defendant, entered judgment for the defendant *n. o. v.* The plaintiff appealed, and the Superior Court reversed the judgment, directing that judgment be entered

on the verdict. The Court, in its opinion, set forth the applicable principle in the following language:

"While we have found no decision of the Supreme Court or this Court which is directly in point, it has been held by many of our sister states that a proprietor of a theater conducted for reward or profit, to which the general public are invited to attend performances, must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theater, and if he fails in this duty he may be held liable for personal injuries occasioned thereby."

It was held that "the question whether defendant was negligent in failing to provide sufficient light for patrons using ordinary care to see the steps * * * was for the jury."

In the same year, the Supreme Court elaborated upon this principle in the case of *Durning vs. Hyman*, 286 Pa. 376, the facts of which will be detailed in a subsequent portion of this note. The opinion, written by the late Justice Sadler with his usual thoroughness, is so replete with interesting and supporting authorities that the portion relevant here is quoted liberally:

"* * * * The liability of the theater owner to one attending a performance has not been the subject of discussion in our appellate courts, though discussions are to be found sustaining recoveries where affirmative proof of negligence was offered by the plaintiff: *Leckstein v. Morris*, 80 Pa. Superior Ct. 354; *Rutherford v. Academy of Music*, 3 Adv. (Unof. Ser.) Superior Ct. 320. In other jurisdictions, the question now expressly presented has been considered, and the applicable rules applied. The proprietor, though not an insurer of safety, impliedly contracts that, except for unknown defects, not discoverable by reasonable means, the (appliance which proved to be defective) is safe: *Scott v. Athletic Assn.*, 152 Mich. 684, 116 N. W. 624; *Logan v. Agricultural Society*, 156 Mich. 537, 121 N. W. 485; *Redmond v. National Horse Show Assn.*, 138 N. Y. Supp. 364; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968. The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe

for the public use. He may not be exonerated merely because he had no precise knowledge of the defective condition of the place to which he has invited the public. When they accept his invitation and pay the prescribed admission fee, they have a right to assume he has furnished a safe place for them to witness the performance': *Lusk v. Peck*, 116 N. Y. Supp. 1051, 1054."

LIABILITY FOR ACTS OF SERVANTS AND AGENTS

In many of our cases, the decisions involved the question of the owner's responsibility for the actions of his servants, such as ticket takers, ushers, etc. The usual rules of master and servant are applicable in these situations, but the defendants often have attempted to escape liability on the ground that their employees have not acted within the course of their employment. A review of these cases presents some very interesting factual situations.

In *James vs. Smith*, 93 Pa. Super. 485, it appeared that the plaintiff, on entering the defendant's theater, asked the employee who took his ticket to be directed to a toilet room. Following the directions given, the plaintiff went to a door, opened it, took one step across the threshold, and was precipitated into the cellar, thereby sustaining injuries.

The trial court submitted the case to the jury, who returned a verdict for the plaintiff. The defendant took an appeal, contending, *inter alia*, that the ticket taker, even though he had authority to give directions to arriving spectators with reference to seats in the theater, was not acting within the course of his employment in directing a patron to a toilet room. The Court concluded that the question of whether or not the ticket taker was acting within his province was a question for the jury and was properly submitted to it.

A peculiar and unusual set of facts is found in the case of *Rice vs. Gibson*, 94 Pa. Super. 541. During the course of the performance, a disturbance occurred in the second or top gallery, which resulted in an unknown patron being thrown over the railing and down upon the plaintiff, who occupied a seat on the first floor. Two of the defendant's

employees, one of whom was a special officer whose duty it was to keep order in the theater, had approached the unknown patron in the gallery for the purpose of ejecting him. A disturbance developed and a fight resulted. During the fistic combat, the employee struck the unknown and knocked him over the banister. The victim fell upon the plaintiff, who, as before stated, was occupying a seat on the first floor.

The trial court submitted the case to the jury, which returned a verdict for the plaintiff. The defendant's later motion for judgment *n. o. v.* was dismissed. Upon appeal to the Superior Court, the defendant contended that the acts of his employees were outside the course of their employment, since they had neither the actual nor the apparent authority to indulge in their belligerent conduct. This contention was not received very favorably by the Superior Court, whose opinion reiterated the

"* * * familiar doctrine that not every deviation of the servant from the strict execution of his duty will relieve the master of responsibility for his acts done during such deviation. If defendant's servants committed wrongful acts in the performance of the duties required of them, it was for the jury to say whether these acts were done in the course of their employment and within the scope of their duty: *Luckett vs. Reighard*, 248 Pa. 24; *Marcus vs. Gimbel Bros.*, 231 Pa. 200; *Blaker vs. Philadelphia Electric Co.*, 60 Pa. Super. 56."

Another case in which the problem of agency or "servantcy" was present is that of *Glaverson vs. Barowsky*, 287 Pa. 583. The plaintiff minor was a boy of eight. On the outer lobby of defendant's theater, there was a ticket-chopping machine weighing between 150 and 175 pounds. A friend of the plaintiff, named Goldberg, was seated behind the ticket-chopper. It appeared that Goldberg, with typical youthful ambition, was voluntarily operating this chopper, with the hope that he might get free admission. The defendant did not know that he was there, and did not employ him. The plaintiff was talking to Goldberg when a patron entered and handed a ticket to Goldberg,

who turned it over to the plaintiff so that the latter might drop the ticket into the machine, but on attempting to remove his hand, found that somehow it had become stuck. In trying to wrench it free, he pulled the ticket-chopping machine upon himself, causing a fracture to his leg. Suit was brought against the owner of the theater, and the statement of claim alleged two items of negligence—first, that the chopper was so located that it was possible for it to topple and injure persons on the premises; second, that the defendant allowed persons under fourteen years of age to work the chopper.

The trial court entered a compulsory non-suit and subsequently refused to take it off. An appeal was taken to the Superior Court, which affirmed the action of the lower court. In a *per curiam* opinion, it was held that there was no negligence in permitting the machine to be located as it was, especially since there was no evidence that the machine was of an unsafe character or in improper working order. It was also remarked that the defendant could not be held responsible for the acts of Goldberg, because no agency whatever was proved, nor did the defendant have any knowledge that Goldberg was operating the machine.

While these cases do not provide any exceptions to the principles governing a master's vicarious responsibility for the acts of his servants, they do present some novel and a few facetious illustrations of the application of these rules.

EVIDENCE AND BURDEN OF PROOF

In these theater cases, it is usually very difficult for the plaintiff to prove all of the essential and attendant facts, because the details are peculiarly within the knowledge of the defendant. The premises are under his supervision and control. He knows the type of equipment used, and he has the opportunity to investigate and examine all the physical objects involved in the accident. What is the plaintiff's burden in such cases? Must he prove affirmatively every item, as is normally incumbent upon a plaintiff? In answer-

ing this important query, our Supreme Court, through Justice Sadler, in *Durning vs. Hyman*, *supra*, thoroughly considered all the elements involved and announced a doctrine which is highly acceptable to plaintiffs in such cases.

In that case, the plaintiff proved that his minor daughter passed up the aisle in the theater to a row of seats containing a number of vacant places. When she pulled one down and sat on it, the left side gave way, causing her to be thrown to the floor, whereby she sustained certain injuries. At the trial, she and a companion testified that the seat "broke", causing the fall.

Upon the conclusion of the plaintiff's testimony, the defendant moved for a non-suit, on the ground that no negligence had been established. This motion was granted, and subsequently the Court refused to take off the non-suit. An appeal was taken to the Supreme Court, which reversed the judgment.

The Court admitted that ordinarily the burden of proving that an injury resulted by reason of the defendant's failure to exercise reasonable care rests upon the plaintiff, even where the claimant is a minor. It added, however, that under certain sets of circumstances, an inference of negligence arises from the manner in which the accident occurs. When, for example, the object which causes the injury is under the management and control of the defendant and the accident is such as does not occur normally if those in control of the thing or premises use proper care, the accident itself is reasonable evidence, in the absence of a satisfactory explanation by the defendants, that the latter failed to exercise due care. The Court concluded that the plaintiff in the case at bar should have been afforded the judicial aid established by this doctrine.

Many theater cases from other jurisdictions were cited to sustain the reversal. The following excerpt from the opinion sets forth these foreign supporting authorities:

"It has been held in New York that, in the absence of proof by defendant showing a condition of uncontradicted facts establishing a reasonable degree

of care to keep the premises in proper condition, the question is for the jury: *Schnizer v. Phillips*, 95 N. Y. Supp. 478. Like rulings are to be found in other jurisdictions, where the theater patron has been injured by slipping on a loose carpet (*Sharpless v. Pantages*, 178 Cal. 122, 172 Pac. 384); in stepping from a row of seats to the aisle which was lower (*Oakley v. Richards*, 275 Mo. 266, 204 S. W. 505; *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340, 211 Pac. 336); into a depression in the aisle (*Currier v. Boston Music Hall Assn.*, 135 Mass. 414); by the unexplained fall of a radiator in the lobby of the building (*Carlson v. Swenson*, 197 Ill. App. 414); and by the breaking of a seat installed for the use of the public: *Fox v. Bronx Amusement Co.*, 9 Ohio App. 426."

In the earlier case of *Lowrey vs. Nixon Theater Company*, 69 P. L. J. 179, the plaintiff introduced evidence to show that she went to the defendant's theater to attend a free lecture. Inside the doorway, she tripped over a mat rug and fell, suffering injury to her arm and shoulder. There was no evidence that the mat was out of place or wrinkled, or that it was inherently dangerous. The Court entered a non-suit and refused to take it off, holding that these facts were not sufficient to warrant an inference of negligence. This case is easily distinguishable from, and quite consistent with, the *Durning* case. Here there was no defective object or condition, such as a broken seat. There was no evidence to show that the mat was not arranged properly. In the *Lowrey* case, moreover, the plaintiff had not paid any admission charge.

In the *Durning* case, the Court expressly stated that "the facts here disclosed do not permit the application of the doctrine of *res ipsa loquitur*", although it hardly can be controverted that the principle applied there is practically tantamount to *res ipsa loquitur*. In *Kupperstein vs. Arch Street Theatre*, 11 D. & C. 275, it was held that where an electric fan attached to the ceiling of a theater falls and injures a patron, the doctrine of *res ipsa loquitur* applies and the plaintiff, on the showing of these facts, is entitled to have the case submitted to the jury. This case seems to be an eminently fair one for the application of this doctrine.

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